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Division III  
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No. 367355

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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LEANNE LEVNO,

Appellant,

v.

ADDUS HEALTHCARE, INC.,

Respondent.

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REPLY OF APPELLANT

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## INTRODUCTION

Respondent Addus Healthcare, Inc. (“Addus”) asserts that summary judgment of Appellant Leanne Levno’s (“Levno”) discharge claims was properly granted because “Addus demonstrated that it had not terminated Levno, and that no material issues of fact existed about this essential element[.]” (See Brief of Respondent at 12) This represents the crux and grand sum of Addus’ argument regarding both Levno’s claim for retaliatory discharge in violation of RCW 74.34.180 as well as for wrongful termination in violation of public policy. However, as evidenced by the record, Addus has not demonstrated that it had not terminated Levno and that no material issues of fact exist as to this element of her claims. In fact, Addus, in moving for summary judgment, attached the deposition testimony it took of Levno wherein she states, with specificity, that she was orally terminated by Dawn Taylor on September 8, 2016. (CP at 183:3-5) In doing so, Addus declared that it “had no dispute with any of the material facts asserted in that deposition.” *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974) (cited in Brief of Respondent at 15, 17, 18). For the purposes of summary judgment, the fact of Levno’s express termination is presumed in Levno’s favor.

Moreover, Addus’ repeated arguments contending that Levno’s testimony that she was orally terminated on September 8, 2016, amounts to

a 'bare allegation' is without merit as the undisputed facts of the case create a strong inference of retaliatory motive and termination. The following facts are undisputed by Addus:

Before August 29, 2016

- Levno began working for Addus in 2007. (See Brief of Respondent at 2; CP at 10; 87-88)
- In 2016, Levno was a full-time caregiver for Addus. (See Brief of Respondent at 2; CP at 57-58; 409)
- In 2016, Levno's only patient was L.J.D. (See Brief of Respondent at 2; CP at 57-58; 409)
- Before August 29, 2016, Addus did not express purported concern regarding Levno's relationship with L.J.D. (See generally CP; Brief of Respondent)
- Levno was a statutorily mandated reporter under RCW 74.34. (See Brief of Respondent at 2)

On August 29, 2016

- Levno made a mandated report of Addus' suspected abuse of L.J.D. to A.P.S. (CP at 10 ¶ 2.11; 169-70)

On August 30, 2016

- Levno submitted her prior day report to Addus. (See Brief of Respondent at 4; CP at 10; 70)

September 1, 2016

- Levno's Addus supervisor Dawn Taylor informed Levno that Levno could no longer provide care for L.J.D. until Levno came into the Addus office to discuss Addus' allegation that Levno's relationship with L.J.D. was improper. (See Brief of Respondent at 4; CP at 3; 72)
- Addus alleged an improper relationship between Levno and L.J.D. for the first time. (See generally CP; Brief of Respondent)

September 2, 2016

- Addus notified L.J.D. and L.J.D.'s husband by letter, that Levno would no longer be providing care for L.J.D. (See Brief of Respondent at 4; CP at 3; 73; 74; 413)

September 8, 2016

- Levno attended her meeting with Addus to discuss Addus' allegation that Levno's relationship with L.J.D. was improper. (See Brief of Respondent at 4; CP at 47)
- Addus made the allegation for the first time. (See generally CP; Brief of Respondent)

- Addus issued the “DISCIPLINARY WARNING NOTICE AND ACTION TAKEN” against Levno, alleging insubordination. (See Brief of Respondent at 4-5; CP at 47)
- Levno refused to sign the “DISCIPLINARY WARNING NOTICE AND ACTION TAKEN” writing instead, “I don’t agree – I refuse to sign.” (CP at 47)

After September 8, 2016

- Levno never again worked for Addus. (See Brief of Respondent at 5-6)

Addus moved for summary judgment asserting that Levno was not terminated by Addus. (CP at 29-42) In doing so, Addus offered Levno’s deposition (CP at 183:3-5), and accepted as true, *Bates*, 12 Wn. App. at 115, her testimony that she was orally terminated by her Addus supervisor Dawn Taylor on September 8, 2016. Addus cannot assert that no dispute of material fact exists regarding its position that Levno was not terminated, while simultaneously, under a CR 56 standard as moving party, relying on Levno’s deposition testimony that she was orally terminated. *Bates*, 12 Wn. App. at 115. If there is no dispute of material fact regarding Levno’s termination, it is that she was terminated on September 8, 2016.

Likewise, Addus' assertion that Levno's deposition testimony is a 'bare allegation' seems to misunderstand the nature of testimony under oath, and implicitly asks the Court to resolve disputed material facts against the non-moving party. The cases upon which Addus relies to support this proposition, as set forth more fully below, are inapplicable. Moreover, under Washington law, summary judgment is inappropriate where the facts surrounding the discharge are disputed. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988). Based upon the procedural posture of the summary judgment motion and appeal, at worst, there is a material dispute only a jury can resolve, as to the essential element that Levno was terminated by Addus.

Addus' contentions that there are no disputed issues of material fact fail as a matter of law. If anything, by attaching Levno's deposition testimony in support of its summary judgment motion, and therefore declaring it undisputed, Addus has rendered the fact of Levno's express termination by Addus supervisor Dawn Taylor on September 8, 2016, the law of the case.

The trial court's granting of summary judgment of Levno's discharge claims was in error.

## ARGUMENT

### **A. Summary Judgment for Levno's Claim of Discharge in Violation of RCW 74.34.180 was Improper.**

Addus cites *Reed v. Streib*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965), for the proposition that before the trial court there was no “related evidence [ ] available that would justify a trial on the issue [of termination].” (See Brief of Respondent at 12) However, when Addus offered the deposition testimony of Levno that she was orally terminated on September 8, 2107 by her supervisor Dawn Taylor, (CP at 183:3-5), it stipulated, for summary judgment purposes, to the truth of that statement. If anything, the fact of termination has become the law of the case. Alternatively, any contradiction of Levno's testimony would create a dispute of a material fact regarding the circumstances of the discharge, likewise, precluding summary judgment. *Grimwood*, 110 Wn.2d at 360.

Moreover, *Reed*, like the other cases cited by Addus, does not support summary judgment, is distinguishable from the case at bar, and actually, if anything, supports Levno's contention that summary judgment was improper. In *Reed* the counter plaintiff alleged simply, that there must have been a conspiracy against him, and that the counter defendant was among the conspirators. 65 Wn.2d at 706-07. The Court held that this amounted to “bare allegations” which were not enough “to carry [counter

plaintiff] to trial” because the counter plaintiff’s “pleading and affidavit ... were unsupported by allegations of evidentiary facts.” *Id.*

Here, unlike *Reed*, Levno’s declaration and pleadings were supported by her deposition which set forth the fact, manner, and method of how she was terminated, and not simply that she “must have” been, based on her speculation of an ultimate fact. (CP at 183:3-5) Levno brought claims for wrongful and retaliatory discharge, (CP at 9-17) and stated in her deposition that she was orally terminated by Dawn Taylor on September 8, 2016. (CP at 183:3-5) Addus now, through argument of counsel, disputes this fact, but Addus offered this testimony as true under the CR 56 standard when moving for summary judgment. (CP at 183:3-5 (Declaration of Daniel P. Crowner in Support of Defendant’s Summary Judgment Motion))

The *Bates* decision to which Addus cites for its contention that no evidence exists to support express termination, (See Brief of Respondent at 15, 17, 18), states that under CR 56:

When the defendant supported his motion for summary judgment with the deposition of the plaintiff, the defendant was essentially declaring that he had no dispute with any of the material facts asserted in that deposition, and that even if all the material facts therein were assumed to be true, the defendant was entitled to judgment as a matter of law.

12 Wn. App. at 115. Therefore, under *Bates*, Addus declared that it had no dispute with the fact that Dawn Taylor orally terminated Levno on September 8, 2016. (CP at 183:3-5) By citing *Bates*, Addus has proven that summary judgment was granted in error.

The testimony on file before the trial judge, included Levno's testimony that she was orally terminated by Dawn Taylor at the September 8th disciplinary meeting. (CP at 183:3-5; 419:5-9) The same meeting where she was presented with, but refused to sign, the disciplinary notice Addus directed to her. (CP at 47) The order granting summary judgment states that the trial court considered the referenced deposition testimony, (See CP at 183:3-5; 419:5-9), as well as the declaration of Dawn Taylor containing the disciplinary notice. (See CP at 47; 419:19-21)

Levno does not allege conclusions, ultimate facts, or vague allegations of a conspiracy that must have, in her mind, occurred. Levno offers specific factual evidence demonstrating the basis of her claims of wrongful discharge and retaliatory discharge.

Addus attempts to obfuscate the record before the trial court. Addus asserts that summary judgment was proper and that Levno's only evidence that she was terminated consisted of her complaint, self-serving declarations, and deposition testimony which contradicted her declarations. Addus states that "Levno admitted in her deposition that she never received

any sort of termination notice from Addus.” (See Brief of Respondent at 14) This is a red herring. Levno has never alleged written notice of termination. (See generally CP) In reality, what Levno did state in her deposition, and in line with her pleadings and declarations, was that during the September 8, 2016 hearing, her supervisor Dawn Taylor told her that she “was being terminated from [ ] Addus.” (CP at 183:3-5).

Levno’s declarations do not contradict her deposition testimony. (CP at 287-292; 408-415) Addus merely tries to argue that a terminated former employee must have been given a written notice of termination to have been terminated; that an oral termination will not suffice. (See Brief of Respondent at 14) Addus’ contention that a plaintiff is required to produce written evidence in an employment discharge claim, contradicts Washington law. In employment discharge cases, plaintiffs may rely on “circumstantial, indirect, and inferential evidence” because “direct smoking gun evidence ... is rare”, and “it will seldom be otherwise.” *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 526, 404 P.3d 464 (2017).

Addus attempts to further obfuscate the record on appeal by asserting that Levno did not provide a citation in her Brief of Appellant that she was orally terminated by Dawn Taylor on September 8, 2016. (See Brief of Respondent at 13) However, Levno provided a record citation for this

fact multiple times. (See Brief of Appellant at 8 (“During that hearing, Levno’s supervisor Dawn Taylor told Levno that she “was being terminated from [ ] Addus.” (CP at 183:3-5)”); 12 (“Levno testified she was orally discharged during the September 8, 2016 meeting. (CP at 12 ¶ 2.24; 183:3-5; 288-89; 405 ¶ 5)”); 25 (“Dawn Taylor was the Addus representative that told Levno that she “was being terminated from [ ] Addus.” (CP at 183:3-5)”).

Addus states that Levno disputes in her appeal, “a number of immaterial facts,” and that “Levno has completely failed to prove an essential element of her case—namely, that Addus terminated her—and the disputed facts, which Levno does raise, are therefore immaterial.” (See Brief of Appellant at 14-15) This is a reckless misconstrual of the material facts Levno raises. The paramount facts that Levno has raised are the events beginning on August 29, 2016, in particular her express termination on September 8, 2016 (which Addus has admitted to for the purposes of summary judgment), not her lack of a supervisor in prior years, nor her 2015 APS report, and reference to those issues in Respondent’s Brief are a distraction.

Addus’ cites *Shields* to support its contention concerning disputed immaterial facts. (See Brief of Respondent at 14-15) However, *Shields* does not support Addus’ position. *Shields v. Morgan Fin., Inc.*, 130 Wn. App.

750, 758, 125 P.3d 164 (2005). *Shields* concerns a plaintiff's motion, which was denied, to compel production from a mortgage company of the loan files of other "borrowers in order to prove the 'public interest' element of the CPA claim." *Id.* at 758. The court ruled that "[w]here proof of an essential element of a claim is lacking, all other facts are rendered immaterial. Shields' discovery claims do not bear on the issue at summary judgment for none of the discovery would have shown whether Long Beach made the required disclosures to Shields under the C.F.R." *Id.* at 758-59. In *Shields*, the "other facts" that the court ruled immaterial, had to do with an ancillary discovery motion regarding irrelevant third parties. *Id.* Here, the disputed fact of whether Dawn Taylor orally terminated Levno on September 8, 2016, notwithstanding the aforementioned procedural posture, is the crux of the case at bar. *Shields*, if applicable at all, supports the materiality of the termination, and the requirement of a trier of fact to make this core determination.

Addus cites *Fischer-McReynolds* for the same proposition. (See Brief of Respondent at 15) *Fischer-McReynolds* is likewise unpersuasive. *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 809, 6 P.3d 30 (2000), *as amended* (Aug. 11, 2000). *Fischer-McReynolds* concerned a plaintiff alleging the presence of a disability in a disability discrimination case, arising because the plaintiff "perceived a stress problem". *Id.* at 810. The

court upheld summary judgment because “[i]f the employee is relying on perception to establish disability, the employer, not the employee, must perceive the disability.” *Id.* at 810. *Fischer-McReynolds* does not apply.

Finally, Addus repeats its argument that “the whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence.” (See Brief of Respondent at 15) Once again Addus misapplies the standard by which a court considers, and construes evidence offered by the moving party on summary judgment, while ignoring the abundance of evidence suggesting both retaliation and termination. Addus moved for summary judgment on the basis that Levno was not expressly terminated. (CP at 29-42; see generally Brief of Respondent) Any evidence offered by Addus in support of its motion, is a concession by Addus for the purpose of summary judgment. CR 56; *See Bates supra*. Addus supported its motion with the deposition of Levno, specifically including the testimony that she was orally terminated by Dawn Taylor on September 8, 2016. (CP at 183:3-5) The order granting summary judgment reflects that the trial court considered this evidence. (See CP at 183:3-5; 419:5-9).

To establish a prima facie case of retaliatory discharge in violation of chapter 74.34 RCW, an employee must show that: (1) she engaged in a statutorily protected activity; (2) the employer took adverse employment

action against her; and (3) the protected activity caused the adverse employment action. *Crownover v. Dep't of Transp.*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011), *review denied*, 173 Wn.2d 1030 (2012); *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002).

Addus tacitly admits that Levno established retaliatory discharge in violation of chapter 74.34 RCW, (See Brief of Respondent at 11-12), disputing only the fact of termination itself. (See Brief of Respondent at 12) However, as set forth above, ad nauseum, Addus, in moving for summary judgment, and attaching in support, Levno's deposition testimony that she was orally terminated on September 8, 2016 by her supervisor Dawn Taylor, (CP 183:3-5) has stipulated to the truth of the testimony, and the fact of the termination.

The trial court granted summary judgment of Levno's claim for retaliatory discharge in violation of chapter 74.34 RCW in error.

**B. Summary Judgment for Levno's Claim for Wrongful Termination in Violation of Public Policy was Improper.**

Regarding the wrongful termination in violation of public policy claim, Addus restates its argument that "Levno failed to provide sufficient facts to make a prima facie case that Addus terminated her." (See Brief of Respondent at 16)

As set forth fully above, Levno has not only provided sufficient facts that Addus terminated her, but procedurally, Addus declared the fact of termination as true and incontrovertible. (CP 183:3-5)

Addus goes on to (mis)state:

Now, Levno seeks to obfuscate her failure to prove an essential element of her case by citing to the summary judgment motion, (CP at 31), citing to Taylor's declaration, (CP at 44), and disputing a number of immaterial facts about the September 8, 2016 written warning for insubordination and violating well-established company rules. Br. of Appellant at 20.

(See Brief of Respondent at 17) This obviously misstates the Brief of Appellant, the record before the trial court, and the record on appeal. Addus' obvious omission of the deposition testimony that Levno was orally terminated by Dawn Taylor on September 8, 2016 (CP at 183:3-5) should be considered a tacit admission that Addus understands said testimony to obviate Addus position that there exists, in its favor, no material factual dispute. In reality, the undisputed fact of termination is the law of the case, at least for summary judgment purposes.

Addus argues that Levno's deposition testimony is raised for the first time on appeal, (See Brief of Respondent at 17-18), even though Addus itself based its summary judgment motion on said testimony. (CP at 183:3-5) Levno responded to Addus motion with a declaration stating that she had

been terminated by Addus. (CP at 287-289) The declaration makes numerous references to the deposition. The deposition was before the trial judge. (See CP at 183:3-5; 419:5-9) The order granting summary judgment specifically references the deposition testimony. (See CP at 183:3-5; 419:5-9). The order granting summary judgment is on Addus' counsel's pleading paper. (See CP at 183:3-5; 419:5-9) Addus argument that the trial court did not consider the deposition testimony is without merit.

Addus then once again relies on *Bates* to support its contention that Levno merely alleges “bare allegation[s]” and “nakedly disput[es] facts”, and that there is no evidence of termination and therefore summary judgment was proper. (See Brief of Respondent at 17-18) Notwithstanding the dispositive procedural effect of *Bates* upon Addus' position, *Bates* does not support Addus' assertion of bare allegations. In *Bates* the plaintiff brought a claim for negligence against a church, but during his deposition, did not allege any facts whatsoever concerning negligent conduct by the church. 12 Wn. App. at 114. Thus, the court held that the plaintiff's claim of negligence was merely a bare allegation and that the deposition of the plaintiff, offered by the defendant, showed there was no genuine issue of any material fact. *Id.* at 114-16. Here, Levno alleges that she was wrongfully and retaliatorily terminated, and has alleged a multitude of facts as to how and why she was terminated.

Addus cites *Meissner* for the proposition that the fact of termination is “a bare allegation [ ] not sufficient to raise a genuine issue of fact.” (See Brief of Respondent at 18) *Meissner* involved a plaintiff’s allegation of a promise by defendant, which if taken as true under a CR 56 standard, would have entitled the plaintiff to a royalty on licensing revenue from a patent assignment. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 950, 421 P.2d 674 (1966). However, the court held that “[a]ssuming the fact of the conversation, and the truth of the statements therein”, “at most, [the] defendant, at one time, had intended to pay royalties to plaintiff, and that this intention was disclosed to him. But an intention to do a thing is not a promise to do it.” *Id.* at 956-57. The court thus held that the contract claim pleaded in the complaint, was a “bare allegation”, and that the court could “pierce such formal allegations of facts in pleadings” by looking at deposition testimony of the plaintiff. *Id.* at 955-56. Here, unlike in *Meissner*, Levno’s deposition testimony supports the formal allegations in her complaint rather than contradicting them. *Meissner* actually supports Levno’s position rather than opposes it.

Like *Bates*, Addus once again cites *Reed* with the same futility. (See Brief of Respondent at 18) In *Reed*, the court found the claims in the counter plaintiff’s complaint to be bare allegations because the counter plaintiff alleged that “there must have been a conspiracy” against him, rather than

testifying as to any specific facts whatsoever showing that the counter defendant had participated in any such conspiracy. 65 Wn.2d at 706-07.

Respondent cites *Scott* to state dicta that “a summary judgment motion will not be denied on the basis of an unreasonable inference.” (See Brief of Respondent at 18.) *Scott* does not apply. *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 47, 747 P.2d 1124 (1987). In *Scott* the court held that it was unreasonable to infer that a teacher’s sexual activities with a student occurred during the teachers “school authorized counseling” of the student for the purposes of respondent superior where there were no facts testified to that demonstrated that the alleged acts occurred during the counseling. *Id.*

Here, there is a strong inference that Levno’s termination, the fact of which Addus has procedurally declared as true, was motivated by her report of ten days prior. (CP at 10 ¶ 2.11; 169-70) She was subsequently and immediately removed from providing care for L.J.D., her only client. (CP 172:16-25; 174:1-7; 31:18-21) Addus subsequently and immediately released L.J.D. as a client. (CP at 294 ¶ 11; 31-18-21) Levno was subsequently and immediately issued a written warning and reprimand, which she refused to sign, writing “I don’t agree - I refuse to sign.” (CP at 47; 172:8-13) Levno was then terminated. (CP at 183:3-5)

In wrongful termination in violation of public policy cases where an employee alleges that she was discharged in retaliation for reporting employer misconduct, i.e., whistleblowing, the employee first must show that the discharge may have been motivated by reasons that contravene a clear mandate of public policy. *See Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 725, 425 P.3d 837 (2018) (explaining the elements of the wrongful discharge tort depending on the employee's allegations); RCW 74.34 *et seq.* If the employee succeeds in presenting a prima facie case, then the employer may show a legitimate, non-pretextual, and non-retaliatory reason for the discharge. *Id.* at 725-26. If the employer meets its burden to show legitimate reasons for the discharge, then the employee must show that her whistleblowing was a significant factor in her discharge. *Id.* at 726-27.

Levno has at minimum, demonstrated a question of fact regarding actual termination, a prima facie case of wrongful termination in violation of public policy, and that her whistle blowing was a significant factor. For the purposes of summary judgment however, Addus has procedurally declared that it agrees with Levno's testimony of actual termination. With all reasonable inferences construed in her favor, Levno has successfully demonstrated a claim for wrongful termination in violation of public policy.

The trial court granted summary judgment of Levno's claim for wrongful termination in violation of public policy in error.

**C. The Trial Court Erred in Denying Levno's Motion for Reconsideration.**

Addus asserts that Levno has not shown that the trial court's ruling that constructive discharge is a distinct cause of action from wrongful termination was " 'contrary to law' under CR 59(a)(7) or that 'substantial justice has not been done' under CR 59(a)(9)." (See Brief of Respondent at 19-20). However, the trial court abused its discretion in ruling that Levno was required to plead constructive discharge as a distinct cause of action.

The Washington Supreme Court stated in *Snyder* that "Washington law does not recognize a cause of action for constructive discharge; rather the law recognizes an action for wrongful discharge which may be either express or constructive." *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001).

The trial court's ruling resulted in substantial injustice, was contrary to law, was an abuse of discretion, and was in error.

**D. The Trial Court Erred in Ruling that the Declaration of H.D. was Inadmissible.**

Addus asserts "using a preponderance test under ER 104(a)" that "Levno failed to establish the alleged agent's authority by a preponderance of the evidence." (See Brief of Respondent at 24-25) However, contrary to

Addus' assertion, it is more probable than not that an Addus supervisor, was the person who identified themselves as an Addus supervisor when they called H.D. to inform her that Addus had terminated Levno. To assert otherwise, that it was more probable than not that the person was not an Addus supervisor, but some third-party strawman, is to essentially proffer a conspiracy theory.

The H.D. declaration is admissible.

**E. Addus Request for Attorney's Fees and Costs is without Merit.**

As set forth above, procedurally, factually, and as a matter of law, summary judgment of Levno's discharge claims was granted in error. Levno raises genuine issues of fact and her appeal is not frivolous.

**CONCLUSION**

For the foregoing reasons, the trial court granted summary judgment of Levno's discharge claims in error.

Submitted this 12<sup>th</sup> day of September, 2019,

**KSB LITIGATION, P.S.**

By: 

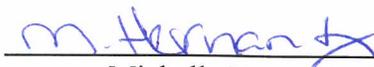
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of September, 2019, I caused to be served a true and correct copy of the foregoing **Reply of Appellants**, by the method indicated below and addressed as follows:

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